97

Supreme Court, U.S.
FILED

1

No. __-___ 08-68 JUL 10 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

IN THE

Supreme Court of the United States

JENNY LEE HENRY, a/k/a Karen Allen, a/k/a Karen Henry, a/k/a Annette Williams, a/k/a Andrea Scantlebury, a/k/a Williams Sherlly, a/k/a Jennylee Henry, a/k/a Lorna Williams, a/k/a Sharon Smith, a/k/a Jennymary Henry, a/k/a Shelly Williams, a/k/a Williams,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General of the United States,*

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

Lindsee P. Granfield
Tanisha L. Massie
Joseph Landau
Rahul Mukhi

Lewis J. Liman
Counsel of Record
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Counsel for Petitioner

July 10, 2008

* Attorney General Michael B. Mukasey was automatically substituted below as the respondent for the former Attorney General, Alberto Gonzales, under Federal Rule of Appellate Procedure 43(b)(2).

QUESTIONS PRESENTED

1. Section 212(h)(1)(B) of the Immigration and Nationality Act ("INA") provides that an alien who would otherwise be inadmissible to the United States is eligible for a waiver of inadmissibility if she demonstrates that denial of her admission would result in "extreme hardship" to certain family members. INA Section 212(h)(1)(C) further provides that the Attorney General may, in his discretion, condition waiver on the filing of a concurrent application for adjustment of status.

Does the Attorney General violate equal protection when one classification of lawful permanent residents ("LPRs") is required to file a concurrent application for adjustment of status but other similarly situated LPRs are not required to do so?

2. An application for a Section 212(h) waiver requires the Attorney General to make a determination of "extreme hardship" in order for an alien to receive the waiver. The Attorney General may also consider discretionary factors. The Board of Immigration Appeals ("BIA") has said that a statutory finding of "extreme hardship" is *ipso jure* a favorable factor to the alien in the discretionary analysis.

Does the INA require the Attorney General to make a determination on "extreme hardship" before he denies a Section 212(h) waiver solely as a matter of discretion?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
DECISIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
I. THERE IS A RECURRING CIRCUIT SPLIT ON WHETHER THE ATTORNEY GENERAL MAY DISTINGUISH BETWEEN CLASSES OF LPRS UNDER INA SECTION 212(H)	15
A. The BIA Has Made An Arbitrary Classification Between LPRs Who Are Applying For A Section 212(h) Waiver	15
B. The Result Here Conflicts With The Law Of The Eleventh Circuit	19

Page

C. The Seventh Circuit Is Also Part Of The Circuit Split..... 23

D. The Circuit Split Is On An Issue Of Vital Importance..... 26

II. THE SECOND CIRCUIT WAS REQUIRED TO ADDRESS MS. HENRY'S EQUAL PROTECTION CLAIM BECAUSE IT HAD JURISDICTION OVER THE ISSUE..... 27

A. Section 212(h) Requires A Determination On "Extreme Hardship" 27

B. *Bagamasbad* Is Inapposite..... 31

C. The Second Circuit's Failure To Address The Equal Protection Issue Does Not Preclude This Court's Review..... 35

CONCLUSION..... 38

TABLE OF AUTHORITIES

Page(s)

Abebe v. Gonzales,
493 F.3d 1092 (9th Cir. 2007) 23

Bastanipour v. INS,
980 F.2d 1129 (7th Cir. 1992).....13, 30, 33

Blake v. Carbone,
489 F.3d 88 (2d Cir. 2007).....11, 22-23

Bolling v. Sharpe,
347 U.S. 497 (1954)..... 2

Butros v. INS,
990 F.2d 1142 (9th Cir. 1993) 22

Campos v. INS,
961 F.2d 309 (1st Cir. 1992) 22

Caroleo v. Gonzales,
476 F.3d 158 (3d Cir. 2007)..... 23

Casalena v. INS,
984 F.2d 105 (4th Cir. 1993)..... 22

Chen v. BIA,
435 F.3d 141 (2d Cir. 2006)..... 7

Chen v. U.S. Dep't of Justice,
471 F.3d 315 (2d Cir. 2006)..... 34

The Chinese Exclusion Case,
130 U.S. 581 (1889)..... 26

Comm'r v. Bilder,
369 U.S. 499 (1962)..... 23

Page(s)

Comm'r v. Estate of Bosch,
387 U.S. 456 (1967) 11

F.S. Royster Guano Co. v. Virginia,
253 U.S. 412 (1920) 17

Foti v. INS,
375 U.S. 217 (1963) 34

Francis v. INS,
532 F.2d 268 (2d Cir. 1976) .....*passim*

Ghassan v. INS,
972 F.2d 631 (5th Cir. 1992) 22

Gonzalez v. INS,
996 F.2d 804 (6th Cir. 1993) 22

Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1 (2000) 30

INS v. Bagamasbad,
429 U.S. 24 (1976) .....*passim*

Inyo County, Cal. v. Paiute-Shoshone Indians,
538 U.S. 701 (2003) 11

Katsis v. INS,
997 F.2d 1067 (3d Cir. 1993) 22

Kim v. Gonzales,
468 F.3d 58 (1st Cir. 2006) 23

Klementanovsky v. Gonzales,
501 F.3d 788 (7th Cir. 2007) 11, 23, 24-25

KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111 (2004).... 30

Page(s)

LaGuerre v. Reno,
164 F.3d 1035 (7th Cir. 1998) 25

Leal-Rodriguez v. INS,
990 F.2d 939 (7th Cir. 1993)..... 22

Malagon de Fuentes v. Gonzales,
462 F.3d 498 (5th Cir. 2006)..... 25

Mitchell v. Forsyth,
472 U.S. 511 (1985)..... 14, 36

Nguyen v. Chertoff,
501 F.3d 107 (2d Cir. 2007)..... 29

Nixon v. Fitzgerald,
457 U.S. 731 (1982).....14-15, 36

Sanchez v. Gonzales,
473 F.3d 133 (5th Cir. 2006)..... 23

St. Joseph Stock Yards Co. v. United States,
298 U.S. 38 (1936)..... 35

United States v. Williams,
504 U.S. 36 (1992)..... 36

Valere v. Gonzales,
473 F.3d 757 (7th Cir. 2007)..... 23

Vissian v. INS,
548 F.2d 325 (10th Cir. 1977) 22

Vue v. Gonzales,
496 F.3d 858 (8th Cir. 2007)..... 23

Yeung v. INS,
76 F.3d 337 (11th Cir. 1995).....*passim*

Page(s)

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 17

Zadvydas v. Davis,
533 U.S. 678 (2001) 26

Administrative Decisions

In re Abosi,
24 I. & N. Dec. 204 (BIA 2007) 18

In re Lok, 18 I. & N. Dec. 101 (BIA 1981),
aff'd, *Lok v. INS*, 681 F.2d 107
(2d Cir. 1982) 18

In re Mendez-Moralez,
21 I. & N. Dec. 296 (BIA 1996) .....*passim*

In re Parodi, 17 I. & N. Dec. 608,
611-12 (BIA 1980) 16, 18

In re Sanchez,
17 I. & N. Dec. 218 (BIA 1980) 16, 18, 20

In re Silva,
16 I. & N. Dec. 26 (BIA 1976) 21

Constitutional and Statutory Provisions

U.S. Const. art. V 2

U.S. Const. art. XIV 2

INA § 212(h), 8 U.S.C. § 1182(h) .....*passim*

INA § 237(a), 8 U.S.C. § 1227(a) 5

INA § 240(a), 8 U.S.C. § 1229a(a) 5

Page(s)

INA § 240A(a), 8 U.S.C. § 1229b(a) .....*passim*

INA § 242(a), 8 U.S.C. § 1252(a) .....*passim*

Other Authorities

Charles Gordon *et al.*,
Immigration Law & Procedure
(rev. ed. 2001).....5, 6, 16, 34

"Immigration Outline" Memorandum from
the Court of Appeals for the Ninth Circuit,
Adjustment of Status 18

Stephen H. Legomsky, *Immigration &*
Refugee Law & Policy (4th ed. 2005)..... 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jenny Lee Henry respectfully prays for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

DECISIONS BELOW

The opinion of the Second Circuit (Pet. App. 1a–7a) is reported at 264 F. App'x 62 (2d Cir. Feb. 11, 2008). The decision of the BIA (Pet. App. 15a-30a) is unreported. The original decision of the Immigration Judge ("IJ") (Pet. App. 31a-74a) is unreported.

JURISDICTION

The Second Circuit entered its judgment dismissing Ms. Henry's petition for review on February 11, 2008. (Pet. App. 2a). A timely petition for rehearing was denied on May 23, 2008. (Pet. App. 13a-14a). Ms. Henry's motion to stay the issuance of the mandate pending the filing of a petition for a writ of certiorari was granted by the Second Circuit on June 10, 2008. (Pet. App. 12a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. art. V.

2. The Fourteenth Amendment to the United States Constitution provides in relevant part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. art. XIV § 1.[1]

3. INA § 212(h), 8 U.S.C. § 1182(h), (Pet. App. 80a-81a), provides in relevant part:

> . . . The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section . . . if—
>
> . . .
>
> (1) . . . (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney Gen-

[1] While the Fourteenth Amendment's equal protection clause applies to the States, this Court has held that the Fifth Amendment imposes the same equal protection requirements on the Federal Government. *See Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

eral that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

4. INA § 240A(a), 8 U.S.C. § 1229b(a), (Pet. App. 82a-83a), provides in relevant part:

(a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

5. INA § 242(a), 8 U.S.C. § 1252(a), (Pet. App. 86a-88a), provides in relevant part:

> (2) . . . (D) Judicial review of certain legal claims. Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.
>
> (5) . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e). . . .

STATEMENT OF THE CASE

This case raises important and recurring constitutional and statutory questions relating to relief from removal afforded to aliens under INA Section 212. The questions arose here in the context of the removal proceedings brought against petitioner Ms. Henry.[2] The material facts of the case are as follows.

---

[2] By way of background, in 1996 Congress amended the INA to replace the terms "deportation proceedings" and "exclusion proceedings," which are now both encompassed by the umbrella term "removal proceedings" that include: 1) pro-

Ms. Henry emigrated from Guyana and was admitted into the United States as an LPR in 1984. (Pet. App. 32a). Since that date she has not left the United States. (Pet. App. 203a). Ms. Henry is the mother and sole caretaker of five daughters, all of whom are U.S. citizens and four of whom are minors. (Pet. App. 32a, 66a). Ms. Henry herself did not become a citizen.

In 2000, removal proceedings were initiated against Ms. Henry due to several shoplifting convictions. She was served with a Notice to Appear, dated June 12, 2000, charging her with deportability pursuant to INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii), as an admitted alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. (Pet. App. 31a). Ms. Henry conceded deportability and filed applications for a waiver of inadmissibility pursuant to INA Section 212(h) and for cancellation of removal pursuant to INA Section 240A(a). (Pet. App. 36a).[3] Ms. Henry,

---

ceedings against an alien who comes to the United States and seeks admission to the country and is charged with a ground of inadmissibility (formerly "exclusion") under INA Section 212; and 2) proceedings against an alien who was admitted to the United States and is subsequently charged with a ground of deportability under INA Section 237. *See* INA § 240(a)(2), 8 U.S.C. § 1229a(a)(2); *see also* Stephen H. Legomsky, *Immigration & Refugee Law & Policy* 496 (4th ed. 2005).

[3] Even though Section 212(h) refers to waiver of grounds of inadmissibility, the BIA has also extended the relief to LPRs charged with grounds of deportability. *See* Charles Gordon et al., *Immigration Law & Procedure* § 51.03[3] (rev. ed. 2001) (hereinafter "Gordon, *Immigration Law*").

already an LPR, did not also file an application for adjustment of status, which is ordinarily the process by which a non-LPR becomes one. *See* Gordon, *Immigration Law* § 51.01.

On December 9, 2005, the IJ denied Ms. Henry's Section 212(h) application on the grounds that she was statutorily ineligible for such relief because she had not submitted a concurrent application for adjustment of status. (Pet. App. 72a-73a). The requirement was imposed on Ms. Henry because she was an LPR who had remained in the United States through the date on which the Attorney General initiated removal proceedings. Under the IJ's interpretation of Section 212(h), if Ms. Henry had left the country, and been charged as deportable after reentry, she would have been eligible for Section 212(h) relief without a concurrent application for adjustment of status. (*Id.*). Ms. Henry argued that this distinction violated equal protection but the IJ held that the agency "cannot rule on the constitutionality of laws enacted by Congress." (Pet. App. 73a).

The IJ never determined whether or not Ms. Henry met the separate "extreme hardship" eligibility requirement under Section 212(h). (*Id.*). Instead, in addition to holding that Ms. Henry was otherwise ineligible because she had not filed a concurrent adjustment of status application, he held in the alternative that, even if Ms. Henry were eligible, he would deny the application as a matter of discretion. (*Id.*). In doing so, the IJ cited the exact same discretionary factors he had considered with

respect to her application for cancellation of removal under INA Section 240A(a). (*Id.*). However, Section 240A(a) does not require the IJ to make a determination of "extreme hardship," nor did the IJ do so here. *See* 8 U.S.C. § 229b(a), (Pet. App. 82a-83a).

The BIA affirmed the IJ's decision and dismissed Ms. Henry's appeal.[4] Ms. Henry filed a petition for review with the Second Circuit, which had jurisdiction to review the agency's final order of removal pursuant to INA § 242(a)1, 8 U.S.C. § 1252(a)(1), (Pet. App. 84a), and over the constitutional claims and questions of law raised in the petition for review pursuant to INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), (Pet. App. 86a).

On appeal, Ms. Henry argued that the agency's ruling that she was statutorily ineligible for a Section 212(h) waiver violated equal protection because it was arbitrarily based on her status as an LPR who had not left the country and had not filed an application for adjustment of status. (Pet. App. 165a-170a, 201a-03a). In particular, she argued that there was no rational basis for distinguishing her from a similarly situated LPR who had committed a deportable criminal offense, had left and returned to the United States, and was charged with a ground of deportation after reentry. (*Id.*).

---

[4] The Second Circuit treated the BIA's decision as supplementing the IJ's ruling and thus both were considered on the petition for review. (Pet. App. 4a) (citing *Chen v. BIA*, 435 F.3d 141, 144 (2d Cir. 2006)). References to "the agency" herein refer collectively to the BIA and IJ.

She also asserted that Section 212(h) required the agency to make a specific determination on "extreme hardship" prior to exercising discretion to deny a waiver because such a finding, once established, becomes a discretionary factor in favor of relief. *See In re Mendez-Moralez*, 21 I. & N. Dec. 296, 301 (BIA 1996), (Pet. App. 293a-302a); (Pet. App. 170a-75a, 203a-06a). She further argued that the IJ's exercise of discretion in the Section 240A(a) context—where the statute, unlike Section 212(h), makes no mention of "extreme hardship" or hardship at all—did not satisfy that requirement. (*Id.*).

The Second Circuit denied review by summary order, dated February 11, 2008. (Pet. App. 1a-7a). In doing so, the Second Circuit characterized the entirety of Ms. Henry's arguments as a challenge to the agency's application of discretion. Thus, the court of appeals said that it did not have jurisdiction to review the petition under INA § 242(a)(2), which limits review of applications under Section 212(h) to constitutional issues and legal questions. (Pet. App. 6a).

The Second Circuit also cited the Supreme Court's decision in *INS v. Bagamasbad* for the proposition that "'absent an express statutory requirement' to the contrary, the agency need not rule on issues of statutory eligibility prior to determining whether to grant a discretionary form of relief." (Pet. App. 5a) (alteration omitted) (citing 429 U.S. 24, 25 (1976) (*per curiam*)). In *Bagamasbad*, an alien had applied for adjustment of status

but "conceded that [her] application would have been properly denied whether or not she satisfied the statutory eligibility requirements." 429 U.S. at 26. The Supreme Court's *per curiam* opinion held: "*In these circumstances*, absent an express statutory requirement, we see no reason to depart from the general rule and require the immigration judge to arrive at purely advisory findings and conclusions as to statutory eligibility." *Id.* (emphasis added).

Ms. Henry filed a petition for panel rehearing and hearing *en banc* arguing, *inter alia*, that the Second Circuit panel had failed to address her equal protection argument and had mischaracterized her other arguments with respect to "extreme hardship" as a challenge to the IJ's discretion. (Pet. App. 108a-127a). In fact, in addition to bringing an equal protection claim, Ms. Henry argued that it was legally improper under Section 212(h) for the IJ to exercise his discretion before making a determination on the statutory eligibility requirement of "extreme hardship." Because the BIA has said that "extreme hardship" is *ipso jure* a favorable factor in the agency's balancing of the equities, Ms. Henry argued that if the agency had made a determination on the issue it could have altered the outcome of her application. (Pet. App. 124a) (citing *Mendez-Moralez* 21 I. & N. Dec. at 301 ("those found eligible for relief under section 212(h)(1)(B) will by definition have already established extreme hardship to qualified family members, which would be a factor favorable to the alien in exercising discre-

tion")). Thus, unlike Bagamasbad, she had not conceded that her application would have been denied even if the IJ had found her statutorily eligible.

The petition for rehearing was denied without opinion on May 23, 2008. (Pet. App. 13a-14a). Ms. Henry filed a motion with the Second Circuit for a stay of the issuance of the mandate pending this Petition for a Writ of Certiorari, and the motion was granted on June 10, 2008. (Pet. App. 12a, 90a-107a). The Department of Justice, on behalf of the respondent, filed a motion to reconsider the stay on June 12, 2008, which Ms. Henry opposed on June 18, 2008. (Pet. App. 348a). That motion is still pending before the Second Circuit as of the date of this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

The Petition should be granted because the result below exacerbates an existing circuit split on the equal protection issue of whether the Attorney General may distinguish between deportable LPRs on the grounds of whether or not they have left and reentered the country. The agency held here that Ms. Henry was ineligible for Section 212(h) relief based on her status as an LPR who had *not* left the country prior to her removal proceedings and had not filed an application for adjustment of status. (Pet. App. 28a, 72a-73a). That decision is in direct conflict with the Eleventh Circuit's decision squarely rejecting the same result on equal protection grounds. *See Yeung v. INS*, 76 F.3d 337, 340-41

(11th Cir. 1995) (holding that a deportable alien who has not traveled abroad and who could not apply for adjustment of status is eligible for a Section 212(h) waiver); *but see Klementanovsky v. Gonzales*, 501 F.3d 788, 791-94 (7th Cir. 2007) (no equal protection violation where Section 212(h) relief is limited to aliens seeking admission or deportable aliens applying for adjustment of status). Indeed, the result here is inconsistent with the logic of the Second Circuit's prior decisions holding that a distinction premised solely on whether an alien has departed and returned to the country (the same distinction made by the agency here) is without rational basis and violates equal protection. *See Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir. 1976) (equal protection requires that INA Section 212(c) relief apply to a deportable LPR regardless of whether he has left the United States and returned); *Blake v. Carbone*, 489 F.3d 88, 103 (2d Cir. 2007) (equal protection requires that a Section 212(c) waiver be available to an LPR whose crime renders her deportable as long as the same crime would render her inadmissible—even if the crime is not enumerated as a basis of inadmissibility).[5]

---

[5] Where, as here, an intra-circuit conflict relates to a recurring and important issue or is accompanied by a "widespread conflict among the circuits," it favors the grant of certiorari. *See Comm'r v. Estate of Bosch*, 387 U.S. 456, 457 (1967); *see also, e.g., Inyo County, Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 709 n.5 (2003) (certiorari granted to address question on which the Ninth Circuit "expressed divergent views").

The uncertainty surrounding whether LPRs similarly situated to Ms. Henry must file a concurrent application for adjustment of status when applying for a Section 212(h) waiver is of vital importance. Indeed, many LPRs may be precluded from filing for adjustment of status, and under the agency's ruling here, which was left undisturbed by the Second Circuit, all such LPRs would be deprived of Section 212(h) relief if, like Ms. Henry, they have not left the country since they entered. Ms. Henry submits that this harsh result violates equal protection because she is arbitrarily treated differently than similarly situated LPRs who are eligible for Section 212(h) waivers without filing concurrent applications for adjustment of status. Given the circuit split on the issue, it should be finally decided by the Supreme Court.

The Second Circuit's determination to dismiss the appeal for lack of jurisdiction, rather than to address the merits of the equal protection claim, does not militate against a grant of certiorari but rather favors it. The IJ said he would deny Ms. Henry's application as a matter of discretion, but he did not make the prerequisite determination on "extreme hardship" as required by Section 212(h). However, a finding of extreme hardship is *ipso jure* a factor that tilts the balance of equities in favor of the applicant and thus is inextricably intertwined in the statute with the agency's discretionary determination. *See Mendez-Moralez*, 21 I. & N. at 301, (Pet. App. 302a). Moreover, the IJ could not simply import the hardship analysis from Section

240A(a)—which does not even refer to hardship—to deny the separate Section 212(h) application. *Cf. Bastanipour v. INS*, 980 F.2d 1129, 1131 (7th Cir. 1992) (Posner, J.) (BIA's "resolution of the section 212(c) issue does not fill the gap left by its failure to discuss the issue of discretion under the asylum provision"). These were questions of law—not questions of discretion—and the Second Circuit plainly had jurisdiction to address them. *See* INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), (Pet. App. 86a).

Finally, the Second Circuit's reliance on *Bagamasbad* to dismiss the appeal was erroneous. (Pet. App. 5a). In *Bagamasbad*, unlike here, the statutory eligibility analysis—whether the alien would be eligible for an immigrant visa and admissible into the United States as a permanent resident—was not intertwined with the IJ's discretionary analysis. Moreover, in *Bagamasbad*, it was conceded that even if the applicant had met the visa and admissibility requirements her application would have been denied. 429 U.S. at 26. The Supreme Court said that, "*[i]n these circumstances*" and in the absence of a direction from Congress, the agency need not rule on issues of statutory eligibility prior to determining whether to grant a discretionary form of relief. *Id.* (emphasis added). That holding is inapplicable under the circumstances here, where Ms. Henry has not made such a concession and, to the contrary, has argued that if the IJ had found her statutorily eligible—and conducted the "extreme hardship" eligibility analysis that the

statute requires—the IJ could have reached a different result. (Pet. App. 170a-74a, 205a). Moreover, changes to the INA since *Bagamasbad* was decided, which have virtually eliminated judicial review of the agency's discretionary findings, have further undermined its applicability in the circumstances here. In particular, the Second Circuit's application of *Bagamasbad* to decline jurisdiction where the IJ proceeded directly to discretion without addressing statutory eligibility would improperly bar *any* judicial review even where there was constitutional or legal error in the eligibility analysis.

Thus, because the alternate grounds that the Second Circuit relied upon to dismiss the petition for review were inadequate, it was required to reach Ms. Henry's equal protection claim. The fact that the court of appeals failed to do so—notwithstanding Ms. Henry's raising it throughout the proceedings (Pet. App. 129a-130a, 165a-170a, 201a-03a)—does not militate against the grant of certiorari under either jurisdictional or prudential grounds. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) ("pure issue of law" was appropriate for Court's "immediate resolution" even though the court of appeals did not address the question); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (where the court of appeals had jurisdiction over the claim, it was "'appropriate for our immediate resolution' notwithstanding that it was not addressed by the Court of Appeals") (quoting *Nixon*, 457 U.S. at 743 n.23). As Justice Powell observed in *Nixon*, if certiorari were denied

because the court of appeals declined jurisdiction over a proper question, the court of appeals decision "would be insulated entirely from review by this Court." *Nixon*, 457 U.S. at 743 n.23. Where, as here, the court of appeals had jurisdiction and was required to address an issue that it did not address, that result would be inconsistent with the Supreme Court's jurisdiction as the court of last resort. *See id.* Moreover, as demonstrated below, the same and closely related equal protection issues have been previously addressed by several other courts of appeals, and the well-developed conflict is ripe for the Supreme Court's resolution.

I. THERE IS A RECURRING CIRCUIT SPLIT ON WHETHER THE ATTORNEY GENERAL MAY DISTINGUISH BETWEEN CLASSES OF LPRS UNDER INA SECTION 212(H)

For the reasons set forth below, the Court should grant a writ of certiorari in order to resolve Ms. Henry's equal protection claim because it presents a far-reaching question that is currently the subject of an inter-circuit conflict.

A. The BIA Has Made An Arbitrary Classification Between LPRs Who Are Applying For A Section 212(h) Waiver

Section 212(h)(1)(B) of the INA provides that an alien who would otherwise be inadmissible to the United States is eligible for a waiver of inadmissibility if she demonstrates that removal would result in "extreme hardship" to certain family

members who are either United States citizens or LPRs. *See* 8 U.S.C. § 1182(h), (Pet. App. 81a). Section 212(h)(1)(C) further provides that the Attorney General may condition waiver on the alien's concurrent application for adjustment of status. *See* 8 U.S.C. § 1182(h)(1)(C), (Pet. App. 81a). The BIA has extended the availability of Section 212(h) relief to LPRs charged with grounds of deportation. *See, e.g., Mendez-Moralez*, 21 I. & N. Dec. at 296, (Pet. App. 294a); Gordon, *Immigration Law* § 51.03[3].

Under the BIA's interpretation of the statute, a Section 212(h) waiver is available to LPRs charged with grounds of deportation in two scenarios: 1) where an LPR has departed and reentered the country subsequent to becoming deportable, a waiver may be granted *nunc pro tunc* to cure the LPR's inadmissibility at time of entry without need for an adjustment of status, *see In re Sanchez*, 17 I. & N. Dec. 218, 222-24 (BIA 1980), (Pet. App. 273a, 280a-81a); and 2) where an LPR, who has never left the United States, Section 212(h) relief from deportation may be granted but only if the LPR concurrently applies for adjustment of status, *see In re Parodi*, 17 I. & N. Dec. 608, 611-12 (BIA 1980) (Pet. App. 285a, 290a-91a)

Thus, if Ms. Henry (who fell within the second category) had left the country and been charged as deportable after she reentered, she would have been eligible for Section 212(h) relief without a concurrent application for adjustment of status. (Pet. App. 72a-73a). However, since Ms. Henry has never

left the country and did not file an application for adjustment of status, the agency held she was ineligible for a Section 212(h) waiver. (*Id.*). Ms. Henry submits that the agency's arbitrary distinction between two similarly situated classes of LPRs violates equal protection. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (equal protection guarantees apply to aliens as well as to United States citizens). Indeed, while courts have recognized that although "Congress [has the power] to create different standards of admission and deportation[,] . . . once those choices are made, individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest." *Francis*, 532 F.2d at 273. Having applied Section 212(h) to LPRs charged with grounds of deportability—as opposed to solely inadmissibility—the agency may not permissibly hinge eligibility on "irrelevant and fortuitous factors" such as whether or not an LPR has left the country and returned. *See id.*; *see also F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (different classifications of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").

Indeed, under the BIA's own rulings, requiring an LPR to file for adjustment of status may be technically improper because an LPR's status does not change—and thus cannot be "adjusted"—until

there is a final order of removal. *See In re Lok*, 18 I. & N. Dec. 101 (BIA 1981), *aff'd*, *Lok v. INS*, 681 F.2d 107 (2d Cir. 1982). The purpose of an adjustment of status application is to adjust the status of a nonimmigrant to that of an LPR.[6] Thus, an alien who is an LPR at the time removal proceedings commence, such as Ms. Henry, does not have to adjust her status. An application for adjustment of status for a deportable LPR would only create a legal fiction whereby she is "held to be in the same position as aliens presenting themselves at the border, seeking entry as [LPRs]." *Parodi*, 17 I. & N. Dec. at 611-12 (internal citations omitted), (Pet. App. 291a). Recognizing that an application for adjustment of status for an LPR serves no purpose other than to create this legal fiction, the BIA ruled that there was no rational reason to require a returning LPR to make a concurrent application for adjustment of status in order to be eligible for Section 212(h) relief. *See Sanchez*, 17 I. & N. Dec. at 222-24, (Pet. App. 280a-81a); *see also In re Abosi*, 24 I. & N. Dec. 204, 206-07 (BIA 2007), (Pet. App. 333a, 335a-38a). Likewise, there is no rational

[6] Historically, an alien applied for LPR status at the U.S. consulate office located in her home country (i.e., consular processing). *See* "Immigration Outline" Memorandum from the Court of Appeals for the Ninth Circuit, *Adjustment of Status* 1, *available at* http://www.ca9.uscourts.gov/ (last visited July 7, 2008). The alien would remain abroad until the application was approved, entering the United States for the first time as an LPR. *Id.* As more aliens came to the United States on temporary visas in the 1950s, Congress created the adjustment of status process to facilitate the LPR application for aliens already in the United States. *Id.*

basis why an LPR who has never left the United States and is charged with deportability should be required to file for adjustment of status when the same deportable LPR would not be required to do so if she had traveled abroad. *See Francis*, 532 F.2d at 273 ("Reason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time."). Ms. Henry submits that because the agency here held otherwise, her rights to equal protection were violated.

B. The Result Here Conflicts With The Law Of The Eleventh Circuit

The agency's decision here, which the Second Circuit left in place by dismissing the petition for review, directly conflicts with the law of the Eleventh Circuit, which held in *Yeung* that the identical distinction failed to meet rational basis review under equal protection. 76 F.3d at 341. In that case, the BIA found the petitioner ineligible for Section 212(h) relief because "it was a remedy reserved for exclusion proceedings." *Id.* at 338. The BIA reasoned that this waiver only applied in deportation contexts "in which the deportee had been able to file for adjustment of status, or the deportee has departed and returned to this country subsequent to his conviction for committing the deportable offense." *Id.* Thus, the BIA in *Yeung*, like the BIA here, found that the petitioner—who

could not apply for adjustment of status and who had not departed and returned to the United States—was ineligible to apply for Section 212(h) relief.

On appeal, the Eleventh Circuit reversed "[b]ecause of the Board's prior application of § 212(h) to deportation proceedings." *Id.* at 338-39. In particular, the court of appeals cited *Sanchez*, 17 I. & N. Dec. 218, (Pet. App. 273a), in which the BIA had found an LPR in deportation proceedings eligible for a Section 212(h) waiver because he had departed and reentered the country:

> To claim, as the INS does here, that [the petitioner] belongs to a different classification of persons simply by virtue of his failure to depart and reenter, is to recognize a distinction that can only be characterized as arbitrary, and that is without a fair and substantial relation to the object of the legislation. . . . We find that [the petitioner] and Sanchez are similarly situated and deserving of similar treatment under the law. In particular, as deportable aliens they are equally deserving of waiver consideration by the Attorney General.

Yeung, 76 F.3d at 340 (citations and quotations omitted).

Notably, the Eleventh Circuit's decision in *Yeung* relied on the Second Circuit's earlier decision in *Francis*. *See Yeung*, 76 F.3d at 340-41 (citing *Francis*, 532 F.3d at 269). In *Francis*, the Second Circuit

examined INA Section 212(c), a provision that, like Section 212(h), was intended to provide an opportunity for the Attorney General, in his discretion, to waive certain grounds of inadmissibility for aliens seeking entry into the United States. *See Francis*, 532 F.2d at 272 (noting Congress's concern that "there be some degree of flexibility to permit worthy returning aliens to continue their relationships with family members in the United States despite a ground of exclusion"). As with Section 212(h), the agency had applied Section 212(c) to deportable aliens, based on its realization "that these considerations apply with equal force to an alien who has already reentered." *Id.* The Second Circuit held that once the benefits of this statute were available to deportable LPRs, the government could not make eligibility for such benefits hinge on random factual distinctions such as whether or not the alien had traveled outside of the country. *Id.* at 273 ("Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.").[7] The equal protec-

[7] The rule in *Francis* was also adopted by the BIA in *In re Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976):

> In light of the constitutional requirements of due process and equal protection of the law, it is our position that no distinction shall be made between permanent resident aliens who temporarily proceed abroad and non-departing permanent resident aliens. We further conclude that permanent resident aliens similarly situated shall be treated equally with respect to their applications for discretionary relief under Section 212(c) of the Act.

tion holding under Section 212(c) in *Francis* has been adopted by every court of appeals that has directly addressed the same issue. *See Katsis v. INS*, 997 F.2d 1067, 1070 (3d Cir. 1993); *Gonzalez v. INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Leal-Rodriguez v. INS*, 990 F.2d 939, 948-49 (7th Cir. 1993); *Butros v. INS*, 990 F.2d 1142, 1143 (9th Cir. 1993) (*en banc*); *Casalena v. INS*, 984 F.2d 105, 106 n.3 (4th Cir. 1993); *Ghassan v. INS*, 972 F.2d 631, 633 n.2 (5th Cir. 1992); *Campos v. INS*, 961 F.2d 309, 313 (1st Cir. 1992); *Vissian v. INS*, 548 F.2d 325, 328 n.3 (10th Cir. 1977).

Moreover, in 2007, the Second Circuit reaffirmed the core equal protection holding embodied by *Francis* in *Blake v. Carbone*. 489 F.3d at 104. In *Blake*, the petitioner was deportable for having committed an aggravated felony and sought 212(c) relief. *Id.* at 91-92. The BIA held that Section 212(c) relief was available only to aliens charged with a ground of deportability that had a statutory counterpart as a ground of inadmissibility. *Id.* at 92. Therefore, the BIA found that the petitioner was ineligible for Section 212(c) relief because the commission of an aggravated felony is not an enumerated basis of inadmissibility. *Id.* In reversing the BIA, the Second Circuit held that an LPR "is eligible for a § 212(c) waiver if his or her particular aggravated felony offense could form the basis of exclusion under § 212(a) as a crime of moral turpitude." *Id.* at 104. In so holding, the court of appeals stated that it is "bound by *Francis's* mandate to ensure that 'permanent residents who are in like circumstances, but for irrelevant and fortuitous

factors, be treated in a like manner.'" *Id.* (quoting *Francis*, 532 F.2d at 273).

Unlike *Francis*, the logic of *Blake* has not been greeted with near uniform adoption by other circuits that have passed on the same question. To the contrary, other circuits have split with the Second Circuit on the *Blake* issue, which has the same jurisprudential underpinnings as the issue at stake here. *See, e.g.*, *Caroleo v. Gonzales*, 476 F.3d 158, 164-68 (3d Cir. 2007); *Valere v. Gonzales*, 473 F.3d 757, 767 (7th Cir. 2007); *Abebe v. Gonzales*, 493 F.3d 1092, 1104-05 (9th Cir. 2007); *Vue v. Gonzales*, 496 F.3d 858, 860-62 (8th Cir. 2007); *Kim v. Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Sanchez v. Gonzales*, 473 F.3d 133, 135 (5th Cir. 2006) (*per curiam*). This further well-developed split among courts of appeals on the meaning of equal protection in the context of INA Section 212 underscores the need for the Supreme Court to grant certiorari and decide "a uniform rule on the point." *Comm'r v. Bilder*, 369 U.S. 499, 501 (1962).

C. The Seventh Circuit Is Also Part Of The Circuit Split

Not only is the Eleventh Circuit's holding in *Yeung* incompatible with the decision below here, as well as the courts of appeals cases applying *Francis*, but it also directly conflicts with law of the Seventh Circuit. In *Klementanovsky*, the Seventh Circuit held that limiting Section 212(h) relief to inadmissible—as opposed to deportable—aliens did not violate equal protection. 501 F.3d at 792-93. In

that case, an LPR who had not departed and returned to the United States was charged with criminal grounds of deportation and applied for a Section 212(h) waiver. *Id.* at 790-91. The IJ found that such waivers only applied to "proceedings where an alien seeks admission, or to circumstances where the applicant is assimilated to the same position as an alien seeking admission [i.e. an alien applying for adjustment of status]." *Id.* at 790. Finding that the petitioner was neither applying for admission or adjustment of status, "but rather relief from deportation," the IJ denied his Section 212(h) waiver. *Id.*

On appeal to the Seventh Circuit, the petitioner argued that "by drawing a line between deportable criminal aliens who have left the country and returned, and those who have stayed and applied for a Section 212(h) waiver directly, Congress and the BIA have denied him his right to equal protection of the laws." *Id.* at 791. In holding that this distinction did not violate equal protection, the Seventh Circuit criticized the Eleventh Circuit in *Yeung* for not addressing why Congress might have had a rational basis for distinguishing between inadmissible and deportable aliens. *Id.* at 793.[8] In

8 In fact, the relevant distinction in *Klementanovsky*, like in *Yeung*, was not between inadmissible and deportable aliens but between two classes of deportable aliens—LPRs who had left the United States and reentered and LPRs who had never left the country. Thus, although the Seventh Circuit criticized *Yeung* and said that *Francis* was inapplicable, *Klementanovsky* also involved "'the government [] taking the irrational position that an alien who after coming to the United

addition, the Seventh Circuit stated that to the extent the *Yeung* decision "was based on a concern about 'international travelers' receiving preferential treatment," the BIA's decision in *Klementanovsky* showed that the "BIA appears to have backed away from that interpretation of the INA that previously allowed § 212(h) waivers to some aliens who left the country and returned." *Id.* at 793.[9]

States had taken a trip abroad and returned and was then ordered deported was entitled to more consideration than one who had never taken a foreign trip after coming to the United States.'" 501 F.3d at 793 (citing *Francis*, 532 F.2d 268; *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)).

[9] Similarly, in *Malagon de Fuentes v. Gonzales*, the Fifth Circuit rejected a petitioner's equal protection claim related to her eligibility for a Section 212(h) waiver. 462 F.3d 498 (5th Cir. 2006). Upon attempted reentry, the petitioner LPR was charged with inadmissibility on the basis of a crime of moral turpitude, and the IJ held her ineligible for a Section 212(h) waiver because she had not been continuously present in the United States for seven years before she was placed in proceedings. She argued that INA Section 101(a)(13) was unconstitutional as applied to her because there was "no rational basis to distinguish between LPRs who have committed offenses under § 1182(a)(2) [criminal grounds of inadmissibility] and left the country briefly and those who have also committed the offenses and not left." *Id.* at 503. In rejecting this argument and finding that the decision survived rational basis scrutiny, the Fifth Circuit noted that it had refused to further extend the logic of *Francis*. *Id.* at 505.

D. The Circuit Split Is On An Issue Of Vital Importance

The circuit split on whether equal protection requires the BIA to treat similarly situated LPRs in the same manner is an issue that impacts thousands of individuals. The Supreme Court has consistently recognized that the exercise of executive and congressional immigration power is subject to important limitations by the Court. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (Congress's immigration power "is subject to important constitutional limitations"); *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889) (congressional authority limited "by the [C]onstitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations"). Here, there are likely thousands of LPRs like Ms. Henry, who have never left the country after their legal admission and subsequently seek a waiver of deportation. Many of these LPRs (who may have continuously spent decades in the United States) will be unable to file an application for adjustment of status. Allowing some LPRs in deportation proceedings—those who have left the country and reentered—to apply for a Section 212(h) waiver without a concurrent application for adjustment of status while imposing the requirement on other LPRs in deportation proceedings—those like Ms. Henry who have never left the country—bears no relation to Congress's legislation and serves no rational purpose.

The decision below here split with the Eleventh Circuit's decision in *Yeung*, which had correctly held that the classification at issue is "a distinction that can only be characterized as arbitrary." 76 F.3d at 340. Addressing the split of authorities and correcting the Second Circuit's decision is worthy of certiorari.

II. THE SECOND CIRCUIT WAS REQUIRED TO ADDRESS MS. HENRY'S EQUAL PROTECTION CLAIM BECAUSE IT HAD JURISDICTION OVER THE ISSUE

The Supreme Court should grant certiorari to address the equal protection issue outlined above because, although the Second Circuit did not explicitly address the question, it was required to do so. Indeed, the discretionary determination of the agency necessarily was predicated on a resolution of that issue adverse to petitioner.

A. Section 212(h) Requires A Determination On "Extreme Hardship"

Section 212(h) provides that a waiver of inadmissibility may be granted if "the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien." INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B), (Pet. App. 81a). After making a determination on extreme hardship, the IJ may exercise his discretion whether to grant the waiver. *See* INA § 212(h)(1)(C), 8 U.S.C. § 1182(h). The BIA has said "[e]xtreme hardship is

a requirement of eligibility, but once established it is but one favorable discretionary factor to be considered." *See Mendez-Moralez*, 21 I. & N. Dec. at 301, (Pet. App. 302a). Thus, a determination on extreme hardship is a necessary statutory component to the subsequent application of the agency's discretion. Under these circumstances, an IJ cannot pretermit the extreme hardship determination under Section 212(h) because it was Congress's intent, as recognized by the BIA, that the balance of the equities should include the result of the extreme hardship analysis.

Here, the agency held that, even if Ms. Henry were statutorily eligible for Section 212(h) relief, it would deny the waiver as a matter of discretion based on the exact same discretionary weighing that occurred under Section 240A(a), a statute that does not have an "extreme hardship" component. 8 U.S.C. § 1229b(a). (Pet. App. 82a-83a). The Second Circuit relied on this holding to assert that it lacked jurisdiction to review the decision because it was based on a discretionary finding. (Pet. App. 5a-6a). However, as Ms. Henry argued below, (Pet. App. 170a-75a, 203a-06a), the agency had committed legal error under the statute because it had skipped the prerequisite step of making a determination on "extreme hardship," which is inextricably intertwined with the balance of the equities. *See Mendez-Moralez*, 21 I. & N. Dec. at 301, (Pet. App. 302a). The court of appeals plainly had jurisdiction over this legal question. *See* INA § 242(a), 8 U.S.C. § 1252(a), (Pet. App.

86a-87a) (court of appeals has sole jurisdiction over "constitutional claims or questions of law" raised in a petition for review); *Nguyen v. Chertoff*, 501 F.3d 107, 111 (2d Cir. 2007) ("The phrase 'questions of law' encompasses, *inter alia*, questions of statutory interpretation. Among such questions are an alien's statutory eligibility for removal and relief from removal.") (internal citations omitted).

Although the agency relied upon its separate analysis denying Ms. Henry's application for a cancellation of removal under Section 240A(a), that statute does *not* include hardship as an eligibility requirement. *See* 8 U.S.C. 1229b(a), (Pet. App. 82a-83a). Rather, the IJ observed under the Section 240A(a) discretionary analysis that Ms. Henry's five American citizen daughters would suffer "hardship," as well as "severe" hardship, if she were removed, but that the hardship did not outweigh other Section 240A(a) factors. (Pet. App. 66a-67a). In holding that it lacked jurisdiction, the Second Circuit relied upon this discussion in the Section 240A(a) context to conclude that some hardship was considered. (Pet. App. 5a-6a). However, the IJ's discussion in the cancellation of removal context under INA Section 240A(a), as discussed immediately below, was no substitute for addressing extreme hardship under INA Section 212(h).

As an initial matter, the "severe" hardship standard considered by the IJ is not a standard contemplated by the provisions of the INA. That

Congress intentionally chose specific levels of hardship for particular forms of relief from removal therefore belies the Second Circuit's conclusion that the IJ's consideration of hardship or "severe" hardship, in the context of cancellation of removal, was the equivalent of a determination of "extreme hardship" under Section 212(h). *See Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) ("Congress 'says in a statute what it means and means in a statute what it says there'"). Indeed, the Supreme Court has affirmed that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely." *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004). Even if "severe" hardship had some legal significance, an IJ may not import findings from one application for relief from removal in order to "fill the gap" in another, as the Seventh Circuit correctly held in *Bastanipour*, 980 F.2d at 1130-31. Thus, the IJ's finding of "severe" hardship in the context of Ms. Henry's cancellation of removal application did not satisfy his obligation to address "extreme hardship" under INA Section 212(h) prior to balancing the equities. Likewise, the Second Circuit should not have relied on this analysis to hold that the agency had sufficiently considered hardship, (Pet. App. 5a-6a), when it had not made a determination on "extreme hardship."

In sum, the agency was not free to exercise its discretion in denying Ms. Henry's Section 212(h) application prior to making a specific determination on "extreme hardship," and thus the Second Circuit had jurisdiction to reverse the IJ's legal error in proceeding directly to the discretionary analysis. Thus, the Second Circuit was required to address Ms. Henry's equal protection claim because there were no alternate adequate grounds to dismiss her petition for review.

B. *Bagamasbad* Is Inapposite

The Second Circuit denied Ms. Henry's petition because it treated her argument with respect to extreme hardship as going to the agency's discretion. To be clear, Ms. Henry did not argue below—and does not argue here—that the agency made an error as a matter of discretion. (Pet. App. 197a-200a). Rather, as outlined above, she argued that the IJ made an error as a matter of law by proceeding to the discretionary analysis without first making a determination on extreme hardship. Under the BIA's precedent, that required finding, if established, would have changed the subsequent balance of the equities in Ms. Henry's favor.

In holding that it lacked jurisdiction over Ms. Henry's "extreme hardship" argument, the Second Circuit relied on *INS v. Bagamasbad*, which stated that "absent an express statutory requirement" to the contrary, the agency need not rule on issues of statutory eligibility prior to determining whether to grant a discretionary form of relief. (Pet. App.

5a) (citing 429 U.S. 24, 25 (1976) (*per curiam*)).[10] However, the Supreme Court's *per curiam* decision in that case is not applicable to the circumstances here.

Bagamasbad involved an alien who had overstayed her visa and applied for adjustment of status. 429 U.S. at 24. It was "conceded that [her] application would have been properly denied whether or not she satisfied the statutory eligibility requirements." *Id.* at 26. The court of appeals had held that the IJ was nevertheless required to address statutory eligibility before denying the application as a matter of discretion. The Supreme Court, noting the concession that the alien's application would not be granted, held that: "*In these circumstances*, absent an express statutory requirement, we see no reason to depart from the general rule and require the immigration judge to arrive at purely advisory findings and conclusions as to statutory eligibility." *Id.* (emphasis added).

---

[10] Despite relying on *Bagamasbad*, the Second Circuit also stated that "Henry does not argue that the BIA erred by failing to determine her statutory eligibility for section 212(h) relief." (Pet. App. 5a). In fact, Ms. Henry argued that the agency incorrectly addressed statutory eligibility in two ways: 1) the agency incorrectly held her to be ineligible for a Section 212(h) waiver as a result of her particular LPR classification, *see supra*, Point.I, and 2) it also erred by denying the application as a matter of discretion because Section 212(h) mandates that the agency address the statutory eligibility requirement of "extreme hardship" before turning to any discretionary factors.

Here, Ms. Henry has not conceded that her application would be denied as a matter of discretion if the IJ had conducted the proper "extreme hardship" analysis. Indeed, unlike in *Bagamasbad*—where the statutory requirements at issue were whether the alien could obtain a visa—the BIA has said here that the statutory eligibility requirement of extreme hardship overlaps with the discretionary factors. *See Mendez-Morales*, 21 I. & N. Dec. at 301, (Pet. App. 302a). Ms. Henry has argued throughout that the agency's decision on her Section 212(h) waiver might have reached a different result had it found her otherwise eligible and addressed the issue of extreme hardship that, if established, would have then been considered in the balance of equities. *Cf. Bastanipour*, 980 F.2d at 1130-31 (remanding the BIA's denial of asylum, notwithstanding its findings concerning the denial of an alternative application for Section 212(c) relief, because the balancing of factors might be determined differently had the BIA made explicit findings on the statutory asylum issues).

Finally, *Bagamasbad* is also distinguishable because it was decided before recent changes to the INA that have restricted judicial review of the Attorney General's decisions to "constitutional claims or questions of law raised upon a petition for review." INA § 242(a), 8 U.S.C. § 1252(a), (Pet. App. 86a). Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA") Congress amended the INA to preclude judicial review of the discretionary findings of the agency

in the context of all forms of relief from removal with the exception of grants of asylum. Pub. L. No. 104-208, 110 Stat. 3009, 3009-607 (codified as amended at 8 U.S.C. § 1252(a)(2)(B)(ii), (Pet. App. 85a-86a). Prior to this amendment, courts of appeal reviewed discretionary determinations in immigration cases under an abuse of discretion standard. *See, e.g., Foti v. INS*, 375 U.S. 217, 228 (1963); *see also* Gordon, *Immigration Law* § 104.09. In that earlier context, permitting an IJ to proceed directly to a discretionary analysis and forego questions of statutory eligibility did not implicate the same concerns because the discretionary determinations were still reviewable.

The application of *Bagamasbad* to a case where an agency's discretionary determination is not subject to review means that if the agency is able to forego the statutory eligibility analysis, the entire application is rendered unreviewable—even when the petitioner's constitutional rights may have been violated. Such a result is inconsistent with the INA, which has conferred jurisdiction on courts to review constitutional claims and legal questions.[11] It is also inconsistent with basic principles

[11] Indeed, the outcome is incompatible with Congress's intent when it enacted the provisions of the REAL ID Act of 2005, which explicitly "restored the jurisdiction of the courts to review [applications for discretionary relief from removal] . . . to the limited extent that the petition for review of such decisions raises a constitutional claim of a question of law." *Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 324 (2d Cir. 2006); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 302 (codified at 8 U.S.C. § 1252(a)(2)(D), (Pet. App. 86a).

of due process because it shields the agency with the unreviewable power to render decisions that may infringe on a petitioner's constitutional rights even where, as here, the agency purports to lack jurisdiction to address constitutional violations itself. *See St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("The supremacy of law demands that there be opportunity to have some court decide whether [an agency applied] an erroneous rule of law . . . ."); (*cf.* Pet. App. 73a) ("agency cannot rule on the constitutionality of laws enacted by Congress").

In sum, the Second Circuit wrongly relied on *Bagamasbad* under the circumstances here. Accordingly, the court of appeals was required to reach the equal protection claim. Because it did not do so, it has contributed to a conflict among the circuits on the issue.

C. The Second Circuit's Failure To Address The Equal Protection Issue Does Not Preclude This Court's Review

Under the INA, the appropriate court of appeals is the "sole and exclusive" forum for judicial review of constitutional claims and legal questions raised by an order of removal. *See* INA § 242(a), 8 U.S.C. § 1252(a). (Pet. App. 86a-88a). Here, the Second Circuit did not reach the equal protection issue.[12]

[12] There was absolutely no issue of waiver of the argument or procedural default.

However, for the reasons discussed above, the court of appeals relied on inadequate alternate grounds in dismissing Ms. Henry's petition, and thus it was in fact required to address Ms. Henry's constitutional claim.

The fact that the lower court did not address the equal protection issue does not preclude Supreme Court review of the question. *See Mitchell*, 472 U.S. at 530 ("purely legal question" is reviewable "notwithstanding that it was not addressed by the Court of Appeals"); *cf. United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'"). To the contrary, the lack of any meaningful federal court review of a constitutional claim—notwithstanding the fact that the issue was repeatedly raised by Ms. Henry below, (Pet. App. 129a-130a, 165a-170a, 201a-03a)—favors review by this Court because, if certiorari were not granted, the agency's decision and the constitutional issue "would be insulated entirely from review." *Nixon*, 457 U.S. at 743 n.23. That result would not comport with basic principles of due process, which at base require a meaningful opportunity to be heard, including where a court of appeals fails to address an issue that it was in fact required to address. Indeed, in *Mitchell* the Court held that, although the court of appeals did not address a "purely legal question" within its jurisdiction, the issue was "appropriate for [the Supreme Court's] immediate resolution." 472 U.S. at 530.

Finally, as demonstrated above, notwithstanding the Second Circuit's failure to address the equal protection claim made by Ms. Henry, the same issue has been well developed at the court of appeals level. Indeed, there are at least fifteen published circuit court decisions on the equal protection issue here and the related *Francis* issue both under INA Section 212, with various splits on whether equal protection allows the agency to distinguish between deportable LPRs based on whether or not they have left the United States. *See supra*, Point I.B. Thus, it is clear that the constitutional issue at stake is ripe for this Court's review without delay.

CONCLUSION

For the foregoing reasons, Ms. Henry respectfully submits that her petition for a writ of certiorari should be granted.

Respectfully Submitted,

Of Counsel:

Lindsee P. Granfield
Tanisha L. Massie
Joseph Landau
Rahul Mukhi

Lewis J. Liman
Counsel of Record
Cleary Gottlieb Steen
& Hamilton LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000

Counsel for Petitioner

July 10, 2008